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No. 96 80

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

MASTER SERGEANT FERNANDO GARCIA,
PETITIONER

v.

UNITED STATES OF AMERICA, *RESPONDENT*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces erred when it found that the trial judge's abuse of discretion in excluding defense expert psychiatric testimony, offered to support a defense of mistaken identity in a case where an arguably suggestive 13 year old child was the victim and only witness to the attempted kidnapping and accompanying offenses, was harmless beyond a reasonable doubt.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

The petitioner, Master Sergeant Fernando Garcia, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 17 April 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at _M.J._ (1996), is located at Appendix A. The opinion of the United States Air Force Court of Military Review, reported at 40 M.J. 533, is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 17 April 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1259(3)(West Supp. 1995) and 10 U.S.C. §867(a)(West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

> The Fifth Amendment of the Constitution of the United States provides in relevant part that: No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

The petitioner was convicted of attempted kidnapping, assault and battery of a minor, indecent liberties with a minor, and communicating indecent language to a minor in violation of 10 U.S.C. §§880, 928 & 934. He was sentenced on 2 September 1992 to a dishonorable discharge, confinement for two years and a reduction in rank to the lowest enlisted grade (E-1).

The allegations arose out of an incident that occurred in Wichita Falls, Texas on 6 March 1992. Linnia Trujillo, 13, was walking home from school when she was passed by a small blue car. R 54. The driver, an adult male, blew her a kiss. R 55. The car parked in an alley ahead of her and when Linnia passed by, the driver asked her if she needed a ride. She declined and kept walking. R 57. As she passed the car, she looked inside and saw that the driver had his penis in his hand. R 59. He told Linnia "You know you want it. You'll enjoy it." He got out of the car, grabbed Linnia by the neck and tried to force

her into the car saying "Now I'm going to have to play rough." She broke free and ran home. R 61.

She told her parents what had happened and her father drove off in search of the small blue car she described—what her father suggested to her must be a Volkswagen "Bug." R 61-63. While waiting for the police in the front yard with her mother, Linnia saw what she said was the same vehicle drive by her house. It was a blue Volkswagen Bug. She hid behind her mother and was unable to get a look at the driver. R 65.

When she was shown a photo lineup that included the petitioner later that day, she was not able to pick him out. At a physical lineup three months later, she picked out both the petitioner and another man but apparently was not positive. The two men she picked out were both depicted in the photo array. One was petitioner. R 66, 345.

When initially asked to describe her assailant, she said he was a short white male, possibly tanned, with bushy, collar length dark hair. R 71-72. The appellant is hispanic and, like all military members, always keeps his hair cut short. Linnia wears glasses but did not have them on at the time of the assault. R 92. Between a quarter and half hour passed between the assault and the time that the blue VW Bug drove by. It was during this interval, a period during which she was extremely frightened and upset, that Linnia's parents were pressing her for details about her assailant. R 92-96. It was just at this time that both parents, separately, saw the petitioner driving through the neighborhood in his blue VW Bug. R 115, 132.

The defense theory of the case was mistaken identification based upon Linnia's vulnerability and suggestability when confronted by authority figures. In other

words, that her testimony at trial identifying the appellant and his car were the product of parents and police attempting to get information from her that she did not have.

At trial, the petitioner called Curtis Wills, PhD, a licensed psychologist with board certifications in forensic psychology and educational counseling, as an expert on eye witness identification. R 461-462. He was offered to testify about the stages of memory, the effect of stress on these stages, the accuracy of recollection of startling events, the effects of questioning by authority figures, the phenomenon of insertion into the memory by post-event questioning, the reliability of lineup procedures and the relation between the accuracy and confidence of memory. R 461-475.

The trial judge limited Dr Wills testimony to the effect of stress and questioning on memory. R 487. She also greatly restricted defense counsel's latitude in exploring even the allowed areas, sue sponte cut off defense counsel prematurely and even refused defense counsel the opportunity to redirect the expert. R 492-499. This prevented the defense from being able to introduce the expert evidence to support much of the defense theory of the case as outlined earlier by counsel. R 461-475.

Both the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces agreed that this exclusion by the trial judge was abuse of discretion but that it did not rise to the level of Constitutional error.

THE TRIAL JUDGE'S ABUSE OF DISCRETION IN EXCLUDING CRUCIAL PORTIONS OF THE DEFENSE EXPERT'S TESTIMONY PREVENTED THE PETITIONER FROM FULLY PRESENTING HIS

MISTAKEN IDENTITY DEFENSE THUS VIOLATING HIS BASIC CONSTITUTIONAL RIGHT TO PRESENT MATERIAL AND FAVORABLE EVIDENCE

> The right to offer the testimony of witnesses . . . is in plain terms the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967). *See also Taylor v. Illinois*, 484 U.S. 400, 108 S.Ct. 646 (1988). This deprivation of defense desired testimony rises to the level of a Due Process violation if petitioner can make "some showing that the evidence lost would be both material and favorable to the defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873, 102 S.Ct. 3440, 3449, 73 L.Ed.2d 1193 (1982).

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the

> additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-113, 96 S.Ct. 2392, 2401-2402, 49 L.Ed.2d. 342 (1971).

The government has never contested that the evidence in dispute was favorable to the defense. The crucial question in the petitioner's case is that excluded evidence's materiality. In other words, whether the additional evidence could have created a reasonable doubt as to the petitioner's guilt.

The evidence showed that the appellant owned a blue VW Bug and that he drove through the victim's neighborhood within a half hour after the incident. The critical issue in the petitioner's case was the 13 year old victim's identification of the petitioner as the man who committed the assault. Without it, all the government could prove was that the petitioner had a car similar in description to that of the assailant and that he drove through the area not long after the assault.

The victim's identification of her assailant was shaky at best. When first questioned immediately after the assault by her parents and then the police, important authority figures to a traumatized 13 year old, her description could have fit virtually any medium sized hispanic or caucasion male. The notable detail was that the assailant had dark, curly **shoulder length** hair—clearly someone other than the petitioner, who, by law had to maintain a short military hair cut. Nor was the victim able to identify the petitioner as her assailant in a photo-lineup. It was only months later that she tenta-

tively identified the petitioner and another in a physical lineup—both of whom had photos in the photo lineup. By the time of trial, however, she testified that the petitioner was her assailant and that she was positive it was his car she saw parked in the alley. Clearly, this crucial improvement in recall was the product of a desire to provide the information that her parents, police, Air Force investigators, military prosecutors—all were pressing her for during the preparation of the petitioner's prosecution. Thus, the petitioner's ability to fully show the pressures a traumatized 13 year old feels to provide what all of the surrounding authority figures so earnestly seek from her, time after time, in their efforts to bring the man who wronged her to justice—are critical to his case. That is exactly the area that the military judge precluded the defense from fully exploring with the psychological expert. That evidence was not only material to the defense but was at the heart of the whole defense case—it was critical.

CONCLUSION

As both the Air Force Court of Criminal Appeals and the Court of Appeals for the Armed Forces found, the trial judge abused her discretion in restricting the defense expert's testimony. The courts below erred, however, when they found that this error did not exclude evidence that was material to the defense. Preventing the defense expert from informing the court about the effects on a 13 year old traumatized child given the circumstances she faced following the assault and leading up to the trial destroyed the petitioner's chance to fully present his defense. This rises to the level of Constitutional error.

Respectfully submitted,

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June 1996

APPENDICES

APPENDIX A

UNITED STATES, APPELLEE

v.

FERNANDO GARCIA, MASTER SERGEANT
U.S. AIR FORCE, APPELLANT

No. 94-0953
CMR No. 30327

United States Court of Appeals for the Armed Forces

Argued October 3, 1995

Decided April 17, 1996

Counsel

For Appellant: *Robert G. Estrada* (argued); *Colonel Jay L. Cohen and Captain Richard D. Desmond* (on brief); *Felicia Godwin.*

For Appellee: *Captain Deborah M. Carr* (argued); *Colonel Jeffery T. Infelise* (on brief); *Lieutenant Colonel Michael J. Breslin.*

Military Judge: Mary M. Boone

Opinion of the Court

SULLIVAN, Judge:

Appellant was tried by a general court-martial composed of officer and enlisted members[1] at Dyess Air

[1]*See* Part I, *United States v. McElroy*, 40 MJ 368, 370-71 (CMA 1994).

Force Base, Texas, during August and September 1992. Despite his pleas of not guilty, he stands guilty before this Court of attempting to kidnap a 13-year-old female and taking indecent liberties with her, in violation of Articles 80 and 134, Uniform Code of Military Justice, 10 USC §§ 880 and 934, respectively. He was sentenced to a bad-conduct discharge, 2 years' confinement, total forfeitures, and reduction to Airman Basic. On December 23, 1992, the convening authority approved this sentence. The Court of Military Review[2] affirmed on April 29, 1994. 40 MJ 533.

On April 11, 1995, we granted review on the following Issue raised by appellate defense counsel and an issue modified by this Court:

I

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED IN APPLYING AN INCORRECT STANDARD OF REVIEW AND IN FAILING TO APPLY THE CORRECT STANDARD OF *CHAPMAN v. CALIFORNIA:* WHETHER APPELLANT WAS PREJUDICED BEYOND A REASONABLE DOUBT BY AN ERROR OF CONSTITUTIONAL MAGNITUDE.

II (modified)

WHETHER THE AIR FORCE COURT OF MILITARY REVIEW WAS ERRONEOUS IN RULING THE MILITARY JUDGE ERRED IN EXCLUDING EXPERT EYEWITNESS TESTIMONY; AND IF THE EXCLUSION WAS ERROR, WAS THE

---

[2]*See* 41 MJ 213, 229 n.* (1994).

COURT OF MILITARY REVIEW ERRONEOUS IN HOLDING IT HARMLESS.

On further consideration, this Court on May 17, 1995, vacated the order dated April 11, 1995. On June 14, 1995, this Court again granted review of the two Issues previously granted and specified an issue as follows:

WHETHER THIS COURT MAY CONSIDER, ON A PETITION FOR GRANT OF REVIEW, THE CORRECTNESS OF THE PORTION OF THE DECISION BY THE COURT OF MILITARY REVIEW FAVORABLE TO THE ACCUSED WHEN NO CERTIFICATE FOR REVIEW HAS BEEN FILED RAISING THAT ISSUE.

We hold that any error committed by the military judge in excluding the proferred defense evidence was, in light of the entire record of trial, harmless beyond a reasonable doubt. *See United States v. Wilson*, 20 MJ 31, 32 (CMA 1985) (harmless-beyond-a-reasonable-doubt standard applied in abundance of caution).[3]

The following facts are set forth by the Court of Military Review in its opinion:

> On March 6, 1992, in Wichita Falls, Texas, a man in a small car accosted LMJ, who was walking home from school. After exposing himself and making indecent comments to her, he jumped from the car and tried to force her into it. Fortunately, she broke free and ran a short distance to her home where she reported the attack to her parents.

---

[3]In view of our resolution of this case, it is not necessary to answer the specified issue.

LMJ and her father, AJ, immediately went looking for the attacker in the family car. LMJ told AJ that the man drove a small blue car with tinted windows and the word "BUG" written in white across the windshield. She added that the car was like the one they used to own, which AJ recalled was a Volkswagen "bug." They were unsuccessful in their quick search and returned home. Leaving LMJ to await the police, AJ resumed the search. About a block from his home, he saw a Volkswagen that fit the description with a license plate number that he recorded as "355 ONE." He saw the male driver but lost the trail when the driver made a quick U-turn.

Back at home, LMJ and her mother, CSJ, stood in the front yard waiting for the police when LMJ saw a small blue Volkswagen with tinted windows and the word "BUG" written in white across the windshield drive by. LMJ told CSJ, "Oh my gosh, Mom, he's coming." CSJ saw the driver and wrote the license plate number down as "355 ONE." The male driver waved and smiled as he drove by.

LMJ described her attacker for the police as a short white male, possibly tanned, with bushy, collar-length dark hair. Appellant is Hispanic, wore a mustache at the time, and, like most male military members, did not have bushy hair. However, the police investigation focused on appellant because he drove a small blue Volkswagen "bug" with tinted windows, the word "BUG" written in white across the windshield, and license number "355 ONE."

> LMJ could not pick her attacker out of a photo array which included appellant's picture. However, she picked both appellant and another male out of a subsequent physical lineup even though appellant had shaved his mustache after the photo array. LMJ's parents also failed to pick appellant out of the photo array, but they recognized appellant at the lineup. However, the lineup deviated from standard investigative procedure because the investigators did not use the same individuals from the photo array—only appellant and one other person LMJ picked from the lineup were also pictured in the photo array.
>
> At trial LMJ could not identify appellant as her attacker. Her parents, on the other hand, were certain appellant was the driver of the Volkswagen they saw in the neighborhood.
>
> Appellant admitted he drove in LMJ's neighborhood on March 6th but denied committing the offenses or trying to elude AJ. Appellant also could not recall driving by LMJ's house.

40 MJ at 534-35.

Sergeant Garcia's defense at trial was one of mistaken identity. To support this defense, he offered the testimony of Dr. Curtis Wills, a board-certified forensic psychologist and consultant to several law enforcement agencies, who was an expert in eyewitness identification. In a session under Article 39(a), UCMJ, 10 USC § 839(a), conducted without members, the defense proffered Dr. Wills' testimony. Appellant in his final brief notes the intended scope of direct examination, which he proffered at the Article 39(a) session, as follows:

> The appellant proffered testimony from Dr. Wills regarding the stages of memory, R. 465, the effect of stress on these stages, R. 466, the accuracy of recollection of startling events, R. 468, the effect of questioning by authority figures, R. 471, the phenomenon of insertion into the memory by post-event questioning, R. 469, the reliability of lineup procedures, R. 473, and the correlation between the accuracy and confidence of a memory, R. 475.

Final Brief at 8.

At trial Dr. Wills testified that stress has a negative impact on the accuracy of eyewitness identification. Moreover, the military judge allowed him to testify that suggestive questioning can impact eyewitness identification and that questioning by authority figures such as parents can affect one's responses. Relying on Mil.R.Evid. 403 and 702, Manual for Courts-Martial, United States, 1984, the judge did not allow the expert to testify about the "inverse" relationship between confidence and accuracy in identification and the theory of memory transference and transposition. *See* Appendix. Later, defense counsel made a motion for the judge to recuse herself because of her rulings on defense evidence. That motion was denied.

The Court of Military Review found the military judge erred in excluding defense evidence in this case. It then determined that appellant suffered no prejudice from these erroneous rulings. Judge Pearson said:

PREJUDICE

> Even though we determine the military judge abused her discretion in excluding relevant

portions of the expert's testimony and restricting the rest, we do not grant relief unless we find prejudice. Article 59(a), UCMJ, 10 USC § 859(a) (1988); *Combs*, 35 MJ at 827; *United States v. Sawyer*, 32 MJ 917 (AFCMR 1991); *see United States v. Weeks*, 20 MJ 22 (CMA 1985). We do not find it here.

In assessing prejudice from excluded expert testimony, we believe the two most important questions to answer are: (1) Was appellant able to adequately present the issue to the members in some other suitable form? and (2) Was the Government's case strong and conclusive when weighed against the defense theory of the case? *See Weeks*, 20 MJ at 25.

We start our review at defense counsel's *voir dire*. Defense counsel expertly questioned the members extensively about identification evidence, tailoring questions to the facts of the case. For example, the members agreed "that if somebody is stressed or frightened, their memory and their perceptions may not be very strong." While *voir dire* questions and answers aren't evidence in the case, the questions and answers show the members were amenable to the defense theory of the case. In presenting that theory, Dr. Wills did testify in general terms about most of the areas in issue except the suggestiveness of the lineup which counsel fully explored through cross-examination of the investigator who conducted it. In closing argument, defense counsel honed the issue of the reliability of the eyewitness' identifications for the members, including how LMJ and her parents had improved on their identifications

> over time. Consequently, we conclude appellant was able to adequately present the issue in spite of the military judge's ruling.
>
> As for the quality of the Government's case, we find the evidence establishing appellant's guilt overwhelming. *See Moore*, 786 F.2d at 1313; *Smith*, 736 F.2d at 1107-1108. In this regard, we will not recount appellant's testimony other than to say he was his own worst enemy on the witness stand. Appellant also made several incriminating admissions to a Wichita Falls detective during a telephone conversation and to an Office of Special Investigations special agent during an interview. He told the detective, "nobody drives his Volkswagen but him," and appeared to know facts about the incident only the perpetrator would know. He admitted to the agent that he "might have stopped and talked to a girl" in LMJ's neighborhood on the date of the offenses, and he "stopped for extended periods of time near [her] school."'

40 MJ at 538-39.

Appellant's basic contention on this appeal is that the Court of Military Review applied the wrong test for determining whether error by the military judge in excluding certain defense evidence was prejudicial. He asserts that the appellate court below found an error of constitutional magnitude in this case, *i.e.*, a violation of his due process right to present a defense under the Fifth Amendment. He then argues that the court below erred in applying the decision of this Court in *United States v. Weeks*, 20 MJ at 25, to determine prejudice arising from such a constitutional error. Finally, he con-

tends that even if the four-factor test of *Weeks* for finding prejudice is appropriate in constitutional error cases, the Court of Military Review did not properly apply all four factors of that test in his case.

We initially note that the Court of Military Review did not hold that constitutional error occurred in this case. *See United States v. Lane*, 474 U.S. 438, 446 n. 8 & 9 (1986). Instead, it held that the military judge violated several rules of evidence by restricting Doctor Wills' expert testimony (*i.e.*, Mil.R.Evid. 403 and 702-04). 40 MJ at 537-38. Then, it assessed the impact of the judge's errors in light of other evidence in this case and found no prejudice. *Id.* at 538-39. This is standard nonconstitutional evidentiary analysis. Mil.R.Evid. 103(a); *United States v. Wimberly*, 60 F.3d 281, 286 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 744 (1996); *United States v. Hanson*, 994 F.2d 403, 407 (7th Cir. 1993); *United States v. Hogan*, 886 F.2d 1497, 1512 (7th Cir. 1989); *United States v. Peak*, 856 F.2d 825, 834-35 (7th Cir.), *cert. denied*, 488 U.S. 969 (1988). Accordingly, we reject appellant's initial assumption that the Court of Military Review found constitutional error in this case.

We further hold that appellant was not denied his constitutional right to present his defense by the military judge's evidentiary rulings limiting Dr. Wills' testimony. Appellant does not challenge the legitimacy of Mil.R.Evid. 403 or 702, or the discretion they confer upon a military judge to admit or exclude evidence. *See Rock v. Arkansas*, 483 U.S. 44 (1987); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). Instead, he simply notes that the Court of Military Review found that the military judge abused her discretion in applying those rules to the excluded portions of Dr. Wills' testimony. *See United States v. Blum*, 62 F.3d 63, 68 (2d Cir. 1995); *United*

States v. Stevens, 935 F.2d 1380, 1400-01 (3d Cir. 1991); *see also United States v. Abel*, 469 U.S. 45, 55 (1984). It is well established, however, that not every error in the exclusion of defense evidence constitutes constitutional error. *See United States v. Cruz-Jiminez*, 977 F.2d 95, 100 (3d Cir. 1992); *Rosario v. Kuhlman*, 839 F.2d 918, 924 (2d Cir. 1988); *Flanders v. Meachum*, 824 F.Supp. 290, 299 n.8 (D. Conn. 1993), *rev'd on other grounds*, 13 F.3d 600 (2d Cir. 1994). To establish constitutional error, exclusion of *material* or vital defense evidence must usually be shown.[4] *See Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 868-69 (1982); *United States v. Robaina*, 39 F.3d 858, 862 (8th Cir. 1994).

For several reasons, we conclude that the defense was not denied material evidence in this case.

First, we note that Dr. Wills was allowed to testify in support of the defense theory of misidentification. He provided testimony to the members about the effect of stress on memory and its suggestibility as induced by questioning of authority figures such as parents.

Second, appellant's cross-examination of a police officer revealed admittedly suggestive circumstances surrounding the photograph spread and the subsequent in-person lineup, both involving appellant. It sufficiently allowed him to present a tainted-identification argument to the members. Dr. Wills' testimony on the theory of transference and transposition was more theoretical and general in nature, so it added little to the police officer's more practical concessions.

---

[4]Our case law indicates that exclusion of certain types of evidence, *i.e.*, defense character evidence (*United States v. Gagan*, 43 MJ 200, 203 (1995); *United States v. Brown*, 41 MJ 1, 4 (CMA 1994)) or victim-bias evidence (*United States v. Bins*, 43 MJ 79, 86 (1995)) can usually be considered constitutional error.

Third, the confidence-accuracy relationship testimony of Doctor Wills did not have great value in this case. *See United States v. Holmes*, 44 F.3d 1150, 1157 (2d Cir. 1995). The victim could not identify appellant as her assailant from the photo spread, at the subsequent line-up, or at trial. 40 MJ at 535. Moreover, her identification of his car as the assailant's car and his race as Spanish could hardly be described as confident. She admitted that her identification of her assailant's car as a Volkswagon came from her father. Moreover, her testimony that she had previously said her assailant was "like a Mexican" was contradicted by the arrestinq police officer. *Cf. United States v. Stephens*, 935 F.2d at 1400 (witness identification at trial was exceedingly confident). In these circumstances, we hold that there was no reasonable likelihood that the excluded testimony of Doctor Wills would change the result in this case. *See generally Kyles v. Whitney*, 115 S.Ct. 1555, 1566 (1995) (Material means "'reasonable probability' of a different result."); *see also People v. Sanders*, 905 P.2d 420, 443 (Cal. 1995).

We further hold that the appellate court below did not err in affirming appellant's case on the basis of the four-pronged test for prejudice articulated in *United States v. Weeks, supra.* That decision does not expressly state whether its trial-impact factors are appropriate for determining prejudice in cases involving errors of constitutional magnitude or just nonconstitutional errors. *Cf. United States v. Vandelinder*, 20 MJ 41, 47 (CMA 1985); *United States v. Wilson*, 20 MJ 31, 32 (CMA 1985) (harmless-beyond-a-reasonable-doubt standard applied in abundance of caution). In any event, evidentiary error is normally tested to see if it resulted in actual prejudice, *i.e.*, substantial and injurious effect or influ-

ence in determining the jury's verdict.[5] Likewise, a determination of reversible constitutional error with respect to an accused's right to present a defense requires at some point consideration of the entire record of trial. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). *Cf. Kyles v. Whitely*, *supra*.[6] Accordingly, the factors in *Weeks*, as considered and supplemented by the Court of Military Review, were an appropriate and necessary basis upon which to decide appellant's case. *See United States v. Gagan*, 43 MJ 200, 203 (1995); *cf. United States v. Levy-Cordero*, 67 F.3d 1002, 1013-15 (1st Cir. 1995).

Finally, we hold that the Court of Military Review fully and fairly applied the *Weeks* test in appellant's case. In *United States v. Weeks*, *supra*, then-Judge Cox clearly articulated the factors to be considered in determining prejudice or harm from an erroneous ruling by the judge excluding defense evidence. He said:

[5]An evidentiary error has not been considered harmless under this standard if it excluded the only or primary evidence in support of or in opposition to a claim or defense. *See United States v. Cardascia*, 951 F.2d 474, 489 (2d Cir. 1991); *United States v. Peak*, 856 F.2d 825, 834 (7th Cir.), *cert. denied*, 488 U.S. 969 (1988); *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir. 1986). For the reasons stated by the Court of Military Review, 40 MJ 533, 538-39 (1994), we reject appellant's argument that error in the military judge's evidentiary rulings so prejudiced him in this case.

[6]Appellant suggests that a violation of his constitutional right to present a defense should be determined without regard to "outcome determinative" prejudice. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986); *Davis v. Alaska*, 415 U.S. 308, 318 (1974). Even if this approach is correct, this constitutional error would still be tested for harmless error employing *Weeks*-like factors before a conviction is reversed. *United States v. Gagan*, 43 MJ 200 (CMA 1995); *see also Delaware v. Van Arsdall*, *supra* at 684; *United States v. Owens*, 789 F.2d 750, 761-62 (9th Cir. 1986), *rev'd on other arounds*, 484 U.S. 554 (1988); *United States v. Cerro*, 775 F.2d 908, 915-16 (7th Cir. 1985).

> We now adopt the following four-pronged analysis to test for prejudice:
>
> First: Is the Government's case against the accused strong and conclusive? *United States v. Lewis*, 482 F.2d 632, 644 (D.C. Cir. 1973).
>
> Second: Is the defense's theory of the case feeble or implausible? *United States v. Lewis, supra* at 646.
>
> Third: What is the materiality of the proffered testimony?...
>
> Fourth: What is the quality of the proffered defense evidence and is there any substitute for it in the record of trial?

20 MJ at 25 (footnote omitted). The opinion of the court below contains a finding on each of these factors adverse to appellant, although perhaps, out of order and in conjunctive fashion. Moreover, even assuming constitutional error occurred in this case, we are convinced that the findings of the court below clearly demonstrate such error was harmless beyond a reasonable doubt. *See United States v. Wilson, supra.*

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge COX, Judges CRAWFORD and GIERKE, and Senior Judge DARDEN concur.

APPENDIX

The military judge did not admit all of this evidence from Doctor Wills. While the members were deliberating on sentence, she stated her reasoning in limiting his testimony, as follows:

> I wanted to put on the record the reasons and some of the findings that I made factually from my rulings regarding his testimony.
>
> First I'd note, of course, that Military Rule of Evidence 702 provides that if scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, then you can allow expert testimony. Of course, there's several questions. First, is the testimony helpful to the members. And then always you have the issue of is the testimony relevant. And I looked at both of those. *I determined that the expert testimony regarding the effects of stress and the general principles of how perceptions are acquired, stored, and retrieved were relevant regarding eyewitness identification in this case.* However, I felt the relevance was very limited in that I would restrict the testimony beyond those areas and that I would restrict it in those areas in a very limited manner to avoid some factors in balancing using Military Rule of Evidence 403. And I'm going to go over those factors.
>
> So initially I did determine that on a limited basis it was relevant, balancing it with the conditions that are talked about in Rule 403, the dangers of unfair prejudice, confusion of the issues, misleading of the members, or by con-

siderations of undue delay, waste of time, or needless presentation of cumulative evidence. Clearly determining the credibility or believability of each witness is within the sole province of the court members. The ability of each witness to observe and recall what they observed is amply presented by examination or cross-examination of the witnesses. *This is true regarding all of the witnesses that we've heard in this case and in particular regarding my exclusion of Dr. Wills' testimony regarding the photo and physical lineups and his testimony regarding suggestibility there.* I find that counsel for both the Government and defense had the opportunity to thoroughly examine and cross-examine the testimony of the police officers who presented the photo lineup to the various witnesses and how she picked those and how she presented that and, as well, the testimony of the OSI agent who conducted the personal lineups in this case. And that testimony included how he selected the members to be included, what steps he took to avoid possible suggestibility, and, on cross-examination, the counsel went into what the Air Force regulation provides regarding such and the questions regarding its suggestibility and why one shouldn't necessarily do a photo lineup as well as in-person lineup. So all those areas were covered by the cross-examination and examination of the special agent.

Now although Dr. Wills read and he testified in the 39(a) session, I would not allow him to testify in the hearing in front of the members—read the OSI report and police reports, those

reports don't fully detail the dynamics of what occurred during those presentations. The members had the photo lineup and they had it, of course, during their findings deliberations as well, which is Prosecution Exhibit 6. And they had the photos from the physical lineup. Those are Prosecution Exhibits 7 and 8. They had those as evidence to observe for themselves any suggestibility, as well as they were able to observe the witnesses who talked about what occurred during those lineups. As factfinders, that is clearly their duty to determine any suggestibility regarding those. Dr. Wills' testimony in this area would therefore not only be cumulative, but confusing and misleading, therefore not admissible, since it is their duty as factfinders to look at the credibility of the witnesses and determine their credibility. And they could themselves observe the suggestibility of any photos or the lineups. Therefore that was in their province as factfinders and Dr. Wills' testimony would therefore invade their province.

Dr. Wills' expert testimony that there is an inverse correlation between the certainty of an eyewitness identification and its accuracy would also create a substantial danger of undue prejudice and confusion and have limited probative value. In examining—when you examine the credibility of witness instruction regarding eyewitness identification, it clearly instructs the members in part—and I'm going to read part of that—whether the witness had an adequate opportunity to observe the offender at the time of the offense will be

affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had an occasion to see or know the person in the past. Such a thesis by Dr. Wills of this inverse correlation would only add confusion and be misleading to this instruction. The instruction clearly tells the members what facts or evidence they should consider in determining the credibility or believability of eyewitness identification and his testimony would not take into consideration these instructions and matters. I would also note—and I have examined the cases that the Government cited so I won't recite them. I did examine *U.S. v. Hicks* [,7 MJ 561], which is the only military justice case I could find and I believe that is all counsel could find as well. And in there it noted—and that was a decision and a case that excluded all of the expert testimony. And it talks about Rules 702 and 403 and the balancing that the judge did in that case. It talked about the testimony of the expert would invade the province of the jury and would create a substantial danger of undue prejudice and confusion because of its aura of special reliability and trustworthiness and it would have limited probative value, directed as it is to the expert's thesis rather than the actual eyewitness accounts. *And in this case I would concur and my reasoning would be the same regarding that testimony as to his thesis of this inverse correlation.* The limited evidence that I am allowing or did allow, since I'm adding and expanding and explaining my findings, but at the time I was going to allow Dr. Wills to tes-

tify regarding eyewitness identification to sufficiently educate the members in the possible pitfalls of eyewitness identification and the effects that such stress has on such identification. And by limiting it, they get that general background information, they're educated, and then they get to evaluate the evidence—the eyewitness evidence or testimony, the testimony of the officers, as well, who were present during any lineups, photo or otherwise. And they can examine all of those witnesses to determine their credibility, suggestibility, and the believability in this case. Additionally, I would note that the Government was not notified of this expert witness until the first day of trial, and he was not available for them to interview until the next morning—early on Thursday morning. And I also considered that and that in terms of proceeding with the case that we'd started with members and the difficulty it might be for the Government to obtain their own expert. I considered all of that. However, that was not a major consideration, although I believe I've clearly outlined the factual basis for it. I did consider that. And, again, I noted that I had reviewed the cases. And that's the basis upon which I made my decision.

(Emphasis added.)

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Master Sergeant FERNANDO GARCIA,
FR457-92-4510
UNITED STATES AIR FORCE

ACM 30327

29 APRIL 1994
—M.J.—

Sentence adjudged 2 September 1992 by GCM convened at Dyess Air Force Base, Texas. Military Judge: Mary M. Boone.

Approved sentence: Bad-conduct discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Robert G. Estrada, Esq. (argued), Colonel Terry J. Woodhouse, Colonel Jay L. Cohen, Lieutenant Colonel Frank J. Spinner, Captain Ursula P. Moul, and Felicia Godwin, Esq.

Appellate Counsel for the United States: Major Barnard N. Madsen (argued), Colonel Jeffery T. Infelise, Lieutenant Colonel Thomas E. Schlegel, and Captain Richard D. Desmond.

Before

HEIMBURG, PEARSON, and SCHREIER
Appellate Military Judges

OPINION OF THE COURT

PEARSON, Judge:

The key issue in this case is whether an accused in a court-martial may present expert testimony to attack the reliability of an eyewitness identification. We hold such testimony is admissible when the accuracy of an eyewitness identification is a critical issue in the case and the expert will testify on specific psychological factors which could have affected the accuracy of the identification. We determine the military judge abused her discretion in excluding the expert testimony here, but affirm the conviction because appellant was not prejudiced by the error.

FACTS

A general court-martial sitting with officer and enlisted members convicted Master Sergeant Garcia of attempting to kidnap a 13-year-old female, LMJ, and taking indecent liberties with her by communicating indecent language and exposing his penis. The members sentenced Sergeant Garcia to a bad-conduct discharge, 2 years confinement, forfeiture of all pay and allowances, and reduction to E-1, which the convening authority approved as adjudged.

On March 6, 1992, in Wichita Falls, Kansas, a man in a small car accosted LMJ, who was walking home from

school. After exposing himself and making indecent comments to her, he jumped from the car and tried to force her into it. Fortunately, she broke free and ran a short distance to her home where she reported the attack to her parents.

LMJ and her father, AJ, immediately went looking for the attacker in the family car. LMJ told AJ that the man drove a small blue car with tinted windows and the word "BUG" written in white across the windshield. She added that the car was like the one they used to own, which AJ recalled was a Volkswagen "bug." They were unsuccessful in their quick search and returned home. Leaving LMJ to await the police, AJ resumed the search. About a block from his home, he saw a Volkswagen that fit the description with a license plate number that he recorded as "355 ONE." He saw the male driver but lost the trail when the driver made a quick U-turn.

Back at home, LMJ and her mother, CSJ, stood in the front yard waiting for the police when LMJ saw a small blue Volkswagen with tinted windows and the word "BUG" written in white across the windshield drive by. LMJ told CSJ, "Oh my gosh, Mom, he's coming." CSJ saw the driver and wrote the license plate number down as "355 ONE." The male driver waved and smiled as he drove by.

LMJ described her attacker for the police as a short white male, possibly tanned, with bushy, collar-length dark hair. Appellant is Hispanic, wore a mustache at the time, and, like most male military members, did not have bushy hair. However, the police investigation focused on appellant because he drove a small blue Volkswagen "bug" with tinted windows, the word "BUG" written in white across the windshield, and

license number "355 DNE."

LMJ could not pick her attacker out of a photo array which included appellant's picture. However, she picked both appellant and another male out of a subsequent physical lineup even though appellant had shaved his mustache after the photo array. LMJ's parents also failed to pick appellant out of the photo array, but they recognized appellant at the lineup. However, the lineup deviated from standard investigative procedure because the investigators did not use the same individuals from the photo array—only appellant and the one other person LMJ picked from the lineup were also pictured in the photo array.

At trial, LMJ could not identify appellant as her attacker. Her parents, on the other hand, were certain appellant was the driver of the Volkswagen they saw in the neighborhood.

Appellant admitted he drove in LMJ's neighborhood on March 6th but denied committing the offenses or trying to elude AJ. Appellant also could not recall driving by LMJ's house.

ADMISSIBILITY OF EXPERT TESTIMONY

The Proposed Testimony

Appellant's theory at trial was mistaken identity. He tendered Dr. Curtis Wills, a board certified forensic psychologist and consultant to several law enforcement agencies, as an expert in eyewitness identification to attack the witnesses' identifications of himself and his car. Dr. Wills proposed to testify regarding (1) the negative effect of startling events and stress on memory, (2) the suggestiveness of post-event questioning by author-

ity figures such as parents and police, (3) the suggestiveness of lineups following photo arrays where the individuals presented to the witness change, and (4) the inverse correlation between a witness' growing confidence in an identification and its actual accuracy.

The Military Judge's Ruling

In a hearing conducted out of the presence of the court members pursuant to Article 39, UCMJ, 10 U.S.C. § 839 (1988), Dr. Wills proffered his testimony. Over strenuous prosecution objection, the military judge accepted Dr. Wills as an expert in "forensic psychology and eyewitness identification." The military judge found Dr. Wills' concepts were "probably somewhat accepted." However, relying on *United States v. Hicks*, 7 M.J. 561 (A.C.M.R.), *pet. denied*, 7 M.J. 249 (1979), the military judge determined that expert testimony on eyewitness identification was not generally admissible in military trials. Consequently, the judge severely restricted Dr. Wills' testimony before the members.

The military judge allowed Dr. Wills to testify to the members in general terms about the negative effect that startling events, stress, and post-event questioning have on the accuracy of a witness' memory. She did not let him testify about the suggestibility of the lineup, tailor his testimony to the specifics of the case, or render an opinion on how the various psychological factors affected the accuracy of LMJ's, AJ's, and CSJ's identifications. Moreover, she *sua sponte* cut off direct examination at times, curtly refused to allow defense counsel to redirect after cross-examination, and didn't give the members an opportunity to ask questions.

In restricting Dr. Wills' testimony, the military judge stated the evidence's probative value under Military Rule of Evidence (Rule) 403 was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the members, undue delay, waste of time, and needless presentation of cumulative evidence.

Admissibility of Expert Testimony to Attack Eyewitness Identifications

Hicks is the only published military case dealing with expert testimony attacking eyewitness identifications. In *Hicks*, the appellant argued the military judge erred in denying his motion to produce a psychologist at government expense who would testify about the unreliability of eyewitness identifications made under stress and the suggestiveness of a lineup. The Army Court of Military Review affirmed the conviction, holding the military judge did not abuse his discretion in denying the motion. In ruling, the Court adopted the four-prong test from the "leading Federal case" of *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973). For expert testimony to be admissible, the proponent must establish: (1) a qualified expert, (2) a proper subject, (3) conformity to a generally accepted explanatory theory, and (4) probative value compared to prejudicial effect. *Hicks*, 7 M.J. at 563.

While upholding the military judge's ruling, the *Hicks* court did not fully explain how the expert testimony failed any prong of the test. In any event, the third prong of the *Hicks/Amaral* test for expert testimony, conformity to a generally accepted explanatory theory aa outlined in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), is no longer valid in military criminal trials,

United States v. Gipson, 24 M.J. 246 (C.M.A. 1987) (applying Mill R. Evid. 702), or federal trials. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, _ *U.S.* _, 113 S. Ct. 2786, 125 L. Ed. 2d (1993) (applying Fed. R. Evid. 702); *United States v. Almador-Galvan*, 9 F.3d 1414, 1418 (9th Cir. 1993) (applying *Daubert* in rejecting *Amaral* test). Instead, general acceptance is merely a factor to be considered in weighing whether expert testimony is both relevant and reliable enough for admission. *Daubert*, 113 S. Ct. at 2795; *Gipson*, 24 M.J. at 251.

Before *Daubert*, the federal circuits split on whether to admit expert testimony offered by the defense to attack the reliability of an eyewitness identification. The circuits that excluded it determined the testimony (1) did not meet the *Frye* standard of general acceptance, (2) invaded the province of the jury to determine credibility of witnesses, (3) was not helpful because jurors could use their common sense and experience to determine reliability of eyewitness testimony, (4) was only offered in general terms without tying the expert opinion to the facts of the case, or (5) would confuse the jury as eyewitness identification was not a central issue in the case. For a discussion of the various circuit positions, see *United States v. Hudson*, 884 F.2d 1016 (7th Cir. 1989) (excluding), *cert. denied*, 496 U.S. 939 (1990) and *United States v. Moore*, 786 F.2d 1308 (5th Cir. 1986) (admitting), *reh'g denied*, 791 F.2d 928 (5th Cir. 1986) (en banc).

In our view, the modern trend is to admit expert testimony on the impact psychological factors such as stress, suggestibility, feedback, and confidence have on the reliability of an eyewitness identification when the identification is a critical issue in the case. Moreover, in military trials, judges should "view liberally the question of whether the expert's testimony may assist the

trier of fact." *United States v. Combs*, 35 M.J. 820, 826 (A.F.C.M.R. 1992) (citations omitted). And, "[i]f anything, in marginal cases, due process might make the road a tad wider on the defense's side than on the Government's." *Gipson* 24 M.J. at 252; *see Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

We do not find the defense proffered expert psychological testimony on the unreliability of the eyewitness identifications in this case any more, or less, mystical than already sanctioned Government expert testimony on rape trauma syndrome, *e.g., United States v. Carter*, 26 M.J. 428 (C.M.A. 1988), and child abuse accommodation syndrome, *e.g., United States v. Suarez*, 35 M.J. 374 (C.M.A. 1992). We find that each of the areas Dr. Wills proposed to testify about, particularly the impact of stress on accuracy and the relationship between a witness' confidence in an identification and its accuracy, went beyond what an average court member might know as a matter of common knowledge. Some of his principles were counter-intuitive and flew in the face of common beliefs. *See United States v. Downing*, 753 F.2d 1224, 1230-1232 (3d Cir. 1985) (quoted in *Daubert*, 113 S. Ct. at 2797; and *Gipson*, 24 M.J. at 251); *Moore*, 786 F.2d at 1312-13; *United States v. Smith*, 736 F.2d 1103, 1106 (6th Cir. 1984) (observation in first lineup may "unconsciously transfer" to second lineup and result in incorrect identification), *cert. denied*, 469 U.S. 868 (1984).

Of course, the proponent of expert testimony must always demonstrate (1) a qualified expert, (2) a proper subject matter, (3) a proper basis for the expert's opinion, (4) the relevance of the testimony to the particular case, (5) the reliability of the evidence, and (6) whether the probative value of the testimony is subatantially outweighed by the considerations outlined in Rule 403,

such as confusion of the issues. *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993), *cert. denied*, __U.S.__, 114 S. Ct. 182 (1993). We merely hold that expert testimony offered on the reliability of an eyewitness identification ia a proper subject matter for expert opinion and is sufficiently reliable for admission in military criminal trials. As to relevancy, we also hold that the proponent of the expert testimony must show how it is relevant to both the specific eyewitness identification at issue and a disputed factual issue in the case. We leave it to the trial judge to determine in any particular case whether the proponent puts the ball between the goal posts, which brings us to the judge's ruling in this case.

ABUSE OF DISCRETION STANDARD

On appeal, we review a military judge's decision to admit or exclude expert testimony using an abuse of discretion standard. *Houser*, 36 M.J. at 397. Even if expert testimony is otherwise admissible under Rule 702, the military judge may still exclude it after performing the balancing test of Rule 403, which we also test for an abuse of discretion. *Houser*, 36 M.J. at 400; *United States v. Brooks*, 22 M.J. 441 (C.M.A. 1986).

While the military judge did not have the benefit of *Daubert* or *Almador-Galvan*, she did have *Gipson*, *Downing*, and Rules 702, 704. In this case we find appellant established: (1) Dr. Wills was an expert in the areas in question, (2) his testimony was on a proper subject matter, (3) he had a proper basis for his opinion, (4) his testimony was relevant to a critical issue in the case, (5) his testimony was sufficiently reliable for admission, and (6) the probative value of the testimony was not substantially outweighed by other considerations outlined in Rule 403. We determine the military judge abused

her discretion in excluding the proffered expert testimony as the following key factors she highlighted for excluding the evidence are not supported in fact or law:

1. Dr. Wills' testimony invaded the province of the members to determine the credibility of the witnesses. Under Rule 704, an expert opinion is not inadmissible because it embraces an ultimate issue in the case. Consequently, invading the province of the members by giving them information on which to make a credibility call is not a valid basis for excluding the testimony. *See Downing*, 753 F.2d at 1229. Dr. Wills was not going to testify as a human lie detector. *See United States v. Hill-Dunning*, 26 M.J. 260 (C.M A. 1988), *cert. denied*, 488 U.S. 967 (1988).

2. Dr. Wills only read the investigative report on the case; he did not interview or test the victim. An expert need not interview a victim, or any other witness, before rendering an expert opinion about a victim; the expert may base an opinion on an investigative report, statements of witnesses, or even listening to trial testimony. Mil. R. Evid. 703; *Houser*, 36 M.J. at 399.

3. The defense did not give reasonable notice of the expert to the Government. While there is some support in the federal circuits for excluding expert testimony when lack of reasonable notice prejudices the other party, *see, e.g., United States v. Dowling*, 855 F.2d 114, 118 (3d Cir. 1988), *aff'd on other grounds*, 493 U.S. 342 (1990), the Government did not offer any prejudice for the military judge to factor into her ruling. The military judge apparently found prejudice *sua sponte* without elaborating on how it occurred. In contrast to her ruling, we note the prosecutor sat quietly when first alerted to the possibility of Dr. Wills' testimony during defense *voir dire* on day one of this week long trial.

4. Rule 403 considerations. The military judge found portions of Dr. Wills' testimony "a little bit incredulous sometimes" because it ran counter to what she believed was commonly true; his testimony about confidence versus accuracy would confuse and mislead the members as he would attack "the whole system" police and courts use to identify suspects; and his testimony about the suggestibility of the lineup was cumulative to the investigator's testimony about not following standard procedure. In this case, where the alleged victim can't identify her attacker at trial and the other eyewitnesses offer identifications made during fleeting casual observations, we fail to see how the only defense evidence directly attacking the Government's circumstantial identification evidence, other than the appellant's broad denial, could ever be a waste of time, too confusing, or cumulative. *See* Mil. R. Evid. 403; *Downing*, 753 F.2d at 1243. As opposed to the trial judge, we see that expert testimony has a proper purpose in attacking preconceived ideas and beliefs even those ideas and beliefs held by the court, and, at times, our "whole system." "The 'dangers inhering in eyewitness identification,' particularly of a stranger encountered under stressful conditions, have been recognized by the courts and the object of much comment." *United States v. McLaurin*, 22 M.J. 310, 312 (C.M.A. 1986) (citations omitted).

5. Restricting the Expert to Generalized Testimony. Even those courts which completely excluded the expert testimony recognized that the expert should only present testimony tailored to the facts of the case and not generalized testimony. *See, e.g., United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979).

PREJUDICE

Even though we determine the military judge abused her discretion in excluding relevant portions of the expert's testimony and restricting the rest, we do not grant relief unless we find prejudice. Article 59(a), UCMJ, 10 U.S.C. § 859(a) (1988); *Combs*, 35 M.J. at 827; *United States v. Sawyer*, 32 M.J. 917 (A.F.C.M.R. 1991); *see United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985). We do not find it here.

In assessing prejudice from excluded expert testimony, we believe the two most important questions to answer are: (1) Was appellant able to adequately present the issue to the members in some other suitable form? and (2) Was the Government's case strong and conclusive when weighed against the defense theory of the case? *See Weeks*, 20 M.J. at 25.

We start our review at defense counsel's *voir dire*. Defense counsel expertly questioned the members extensively about identification evidence, tailoring questions to the facts of the case. For example, the members agreed "that if somebody is stressed or frightened, their memory and their perceptions may not be very strong." While *voir dire* questions and answers aren't evidence in the case, the questions and answers show the members were amenable to the defense theory of the case. In presenting that theory, Dr. Wills did testify in general terms about most of the areas in issue except the suggestiveness of the lineup which counsel fully explored through cross-examination of the investigator who conducted it. In closing argument, defense counsel honed the issue of the reliability of the eyewitness' identifications for the members, including how LMJ and her parents had improved on their identifications over time. Consequently, we conclude appellant was able to ade-

quately present the issue in spite of the military judge's ruling.

As for the quality of the Government's case, we find the evidence establishing appellant's guilt overwhelming. *See Moore*, 786 F.2d at 1313; *Smith*, 736 F.2d at 1107-1108. In this regard, we will not recount appellant's testimony other than to say he was his own worst enemy on the witness stand. Appellant also made several incriminating admissions to a Wichita Falls detective during a telephone conversation and to an Office of Special Investigations special agent during an interview. He told the detective, "nobody drives his Volkswagen but him," and appeared to know facts about the incident only the perpetrator would know. He admitted to the agent that he "might have stopped and talked to a girl" in LMJ's neighborhood on the date of the offenses, and he "stopped for extended periods of time near [her] school."

REMAINING ISSUES

We resolve the remaining assigned errors adversely to appellant, including the legal and factual sufficiency of the evidence, *United States v. Turner*, 25 M.J. 24 (C.M.A. 1987), and the appropriateness of the sentence, *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988).

Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge HEIMBURG and Judge SCHREIER concur.

ALVIN J. STRIBLIN
Technical Sergeant, USAF
Chief Court Administrator, AFCMR